

FEDERAL MAGISTRATES COURT OF AUSTRALIA

NGUYEN v MINISTER FOR IMMIGRATION [2004] FMCA 551

MIGRATION – Invalid visa application – duty of Minister not to consider – applicant for spouse visa previously refused on-shore business visa application – whether errors of law in refusal to consider second application.

Migration Act 1958 (Cth), ss.5(1), 46, 47, 48

Applicant:	THI KIM THOA NGUYEN
Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS
File No:	SZ1005 of 2003
Delivered on:	26 August 2004
Delivered at:	Sydney
Hearing date:	26 August 2004
Judgment of:	Smith FM

REPRESENTATION

Counsel for the Applicant:	Applicant in person
Counsel for the Respondent:	Mr Ben Cramer
Solicitors for the Respondent:	Blake Dawson Waldron

ORDERS

- (1) Application dismissed.
- (2) The Applicant to pay the Respondent's costs assessed in the amount of \$3000.
- (3) The Applicant to have three months to pay those costs from today.
- (4) Order (1) be stayed until and take effect on 16th September 2004.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SZ1005 of 2004

THI KIM THOA NGUYEN

Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**

Respondent

REASONS FOR JUDGMENT

(Revised from transcript)

1. This is an application to this court under section 483A of the *Migration Act 1958* (Cth) seeking review under the *Judiciary Act 1903* (Cth) and the Migration Act of an administrative action taken by a delegate of the Minister which was communicated to the applicant in a letter dated 15 February 2002. In that letter Linda Baker in the Resident's Branch of the Department said:

I write regarding your application for a Partner visa, which you made on 14 February 2002. The application you made is considered an application for two separate visas, the two visas are a Partner (Temporary)(Class UK) visa and a Partner (Residence) (Class BS) visa. They can more easily be referred to as the temporary Partner visa and the permanent Partner visa ...

The Migration Act 1958 ("the Act") requires this department to only consider valid visa applications. If a valid

application is determined to be an invalid application, then it is not to be considered further.

REASON FOR INVALIDITY

The requirements for making a valid visa application are set out in the Act. I regret to tell you that your application has been determined to be an invalid visa application, this is because of section 48 of the Act.

Generally, section 48 applies to a person who:

- *Is not a citizen of Australia and*
- *Does not hold a substantive visa and*
- *After last entering Australia, was refused a visa or had a visa cancelled.*

A substantive visa is any visa other than a bridging visa or criminal justice visa. For example, it might be a visitor, business or student visa.

You last entered Australia on 12 July 1998.

Your last substantive visa ceased on 1 March 1999.

You were refused a Business Long Stay subclass 457 visa on 1 May 1999.

You made this application on 14 February 2002.

Therefore, when you made this application, section 48 applied to you. Any person to whom section 48 applies can only validly apply for a visa of a particular type while they remain in Australia. You cannot make a valid application for a Partner visa in your current circumstances.

Section 48 of the Act will continue to apply to you while you remain in Australia, unless you are granted a substantive visa. As this particular application is invalid, it cannot be considered further.

2. The letter then proceeded to inform the applicant how she could obtain further information about her status under the Migration Act.
3. The letter was received on 15 February 2002 by the applicant. On 4 June 2003 she made an application to this Court using the Federal Court form for applications under the Judiciary Act and the Migration Act. Nothing turns on the form she used, since it is clear that this Court has the same jurisdiction as the Federal Court, that being the effect of section 483A of the Migration Act. Due to the opinions that I

have reached in this case I need not explore the nature of that jurisdiction further.

4. In her application she said in paragraph 1 under the heading, "The applicant claims":

I and my husband living together as husband and wife and my application for Permanent Residence in Australia and this application had been returned as invalid.

We are living together more than 2 years.

5. In the part of the form that asked for "the grounds of the application" she has written:

Regarding to news release from the Minister for Immigration and Multicultural Affairs (copy enclosed).

I am seeking to appeal the decision that my application for Permanent Residence in Australia is invalid.

In July 2003 I have my new born child with my husband. He is an Australian citizenship.

6. As is apparent, this application has been completed without legal assistance and the applicant has appeared today without legal assistance. Her husband Mr Ong sought to speak on her behalf with her consent, and I allowed him to do so. He has presented a bundle of additional documents, some of which are plainly relevant and were omitted from the Green Book, and a short written submission which he developed orally.

[7.] Included in his submission is a media release, which I understand to be the one referred to in the application, by the then Minister dated 30 May 1996. It announced a change or proposed change in Migration law to allow "ONSHORE APPLICATIONS FOR **SOME UNLAWFUL SPOUSES**" (my emphasis). It quoted the Minister as announcing:

"The current situation is that people who overstay their visa for more than 28 days are compelled to apply overseas, if they seek residency in Australia on the basis of a longstanding relationship with an Australian resident or citizen," Mr Ruddock said.

“This measure can cause considerable hardship and financial strain to couples who have shown a genuine commitment to each other. It can also be traumatic for children in the affected family.

“People should come forward and discuss their options before they place themselves and their family in this situation. However, I have decided that from 1 August 1996, where there are compelling circumstances, applications may be made in Australia.

“Where there are compelling circumstances, it will be possible to waive the requirement for the spouse to travel overseas to lodge their application at an Australian mission. This measure is designed to reduce the penalty imposed on Australians, by their partners who have taken a decision to ignore Australian law and overstay their visa.”

Compelling circumstances will be considered to be those of a strongly compassionate nature, such as where there are Australian-citizen children in the relationship or where the couple have been in genuine and continuing relationship for at least two years.

“I expect the waiver to be used in limited circumstances and no-one should assume that there is a general lifting of restrictions on visa overstayers,” Mr Ruddock said.

“Australia expects people to abide by the conditions in their visa and I would strongly urge people who contemplate overstaying their visa to consider the impact their decision might have on family, friends or others who rely on them.”

The changes arise from a review by the Department of Immigration and Multicultural Affairs of the legal provisions concerning spouse migration within Australia.

The changes do not apply to applicants who have previously been refused a visa since their last entry to Australia. People in these circumstances will still be required to leave Australia to apply for migration (my emphasis).

People with unfinalised spouse or interdependency applications on 1 August 1996, will be able to be considered under these changes. Applications may be lodged at offices of the Department of Immigration and Multicultural Affairs at any time, although they cannot be finalised until after 1 August 1996.

7.[8.] In the applicant's case, on the evidence before me and the evidence before the administrative decision-maker Ms Baker, the applicant last arrived in Australia on 12 July 1998 on a Student (Temporary)(Class TU) subclass 560 (Student) visa which ceased on 1 March 1999. On 3 March 1999, shortly after it ceased, the applicant lodged an application for a Long Stay Business Visa subclass 457.

8.[9.] It is not contested by the applicant that that application was refused and that the applicant was informed that her application had failed. The copy of a letter to the applicant dated 1 May 1999 which was retained on the Department's files states:

On 1/5/1999 a decision was taken to refuse to grant you that visa. The attached decision record gives the reasons for the refusal.

9.[10.] The letter then advised merits review rights with MIRO, and warned that a bridging visa would cease in 35 days from the date of the letter. The attached record of decision indicated that the grounds for refusing the application was that the applicant did not meet a substantive criterion, being a requirement that the applicant be the subject of an approved business nomination by an employer who is a pre-qualified business sponsor or a standard business sponsor, and that the applicant therefore did not satisfy the requirements of migration regulations 457(4) or 457(5).

10.[11.] The applicant does not now contest that she made this application for a visa and that it was refused, nor that she has continued to stay in Australia without going overseas. The present application for a spouse visa was made on 14 February 2002 and relied on the applicant's relationship with Mr Ong which had been developing for several years and which, on the evidence now before me, has produced a daughter, Michelle, born on 26 July 2003. Indeed, Michelle was in the court room throughout the course of the hearing.

11.[12.] At all relevant times, ss 46, 47 and 48 of the Migration Act provided:

46 *Valid visa application*

(1)

Subject to subsections (1A) and (2), an application for a visa is valid if, and only if:

- (a) *it is for a visa of a class specified in the application; and*
- (b) *it satisfies the criteria and requirements prescribed under this section; and*
- (ba) *subject to the regulations providing otherwise, any visa application charge that the regulations require to be paid at the time when the application is made, has been paid; and*
- (c) *any fees payable in respect of it under the regulations have been paid; and*
- (d) *it is not prevented by section 48 (visa refused or cancelled earlier), 48A (protection visa), 91E (CPA and safe third countries), 91K (temporary safe haven visa), 91P (non-citizens with access to protection from third countries), 161 (criminal justice), 164D (enforcement visa), 195 (detainees) or 501E (visa refused or cancelled on character grounds).*

...

47 Consideration of valid visa application

- (1) *The Minister is to consider a valid application for a visa.*
- (2) *The requirement to consider an application for a visa continues until:*
 - (a) *the application is withdrawn; or*
 - (b) *the Minister grants or refuses to grant the visa; or*
 - (c) *the further consideration is prevented by section 39 (limiting number of visas) or 84 (suspension of consideration).*
- (3) *To avoid doubt, the Minister is not to consider an application that is not a valid application.*
- (4) *To avoid doubt, a decision by the Minister that an application is not valid and cannot be considered is not a decision to refuse to grant the visa.*

48 Non-citizen refused a visa or whose visa cancelled may only apply for particular visas

(1) *A non-citizen in the migration zone who:*

(a) *does not hold a substantive visa; and*

(b) *either:*

(i) *after last entering Australia, was refused a visa, other than a refusal of a bridging visa or a refusal under section 501, 501A or 501B, for which the non-citizen had applied (whether or not the application has been finally determined); or*

(ii) *held a visa that was cancelled under section 109 (incorrect information), 116 (general power to cancel), 134 (business visas), 137J (student visas) or 137Q (regional sponsored employment visas);*

may, subject to the regulations, apply for a visa of a class prescribed for the purposes of this section, but not for a visa of any other class.

(2) *For the purposes of this section, a non-citizen who:*

(a) *has been removed from the migration zone under section 198; and*

(b) *is again in the migration zone as a result of travel to Australia that is covered by paragraph 42(2A)(d) or (e);*

is taken to have been continuously in the migration zone despite the removal referred to in paragraph (a).

Note: _____ Paragraphs 42(2A)(d) and (e) cover limited situations where people are returned to Australia despite their removal under section 198.

12.[13.] On the uncontested facts and evidence which was before the decision-maker and is now before me, I am satisfied that the only findings open are that:

- a) at the time of her application for a spouse visa, the applicant did not "hold a substantive visa" within s.48(1)(a), noting the definition of "substantive visa" in s.5(1) and that at the time of

her application the applicant did not hold one of the three excluded categories, and

- b) within the terms of s.48(1)(b) the applicant after last entering Australia had been refused a visa other than a bridging visa, and the ground of the refusal was not under ss.501, 501A or 501B, those being character grounds.

13.[14.] The pre-conditions for the operation of section 48 therefore applied to the applicant at the time that she made her visa application. She was therefore by force of section 48(1) permitted only to apply for a "visa of a class prescribed for the purposes of this section, but not for a visa of any other class". The classes of visa prescribed for the purposes of the section are set out in regulation 2.12 of the regulations as they stood at the relevant time. It provided:

2.12 Certain non-citizens whose applications refused in Australia (Act, s.48)

(1) For section 48 of the Act (which limits further applications by a person whose visa has been cancelled, or whose application for a visa has been refused) the following classes of visas are prescribed:

- (a) subject to subregulation (2), Special Eligibility (Residence) (Class AO);*
- (c) Protection (Class XA);*
- (ca) subject to subregulation (3), Medical Treatment (Visitor) (Class UB);*
- (e) Territorial Asylum (Residence) (Class BE);*
- (f) Border (Temporary) (Class TA);*
- (g) Special Category (Temporary) (Class TY);*
- (h) Bridging A (Class WA);*
- (j) Bridging B (Class WB);*
- (k) Bridging C (Class WC);*
- (l) Bridging D (Class WD);*

(m) Bridging E (Class WE);

(ma) Bridging F (Class WF);

(n) Resolution of Status (Temporary) (Class UH);

(o) Resolution of Status (Residence) (Class BL);

(p) Child (Residence) (Class BT).

(2) Paragraph (1) (a) applies to a person if he or she meets the requirements of subclause 832.211 (3) of Schedule 2.

(3) Paragraph (1) (ca) applies to a person if and only if he or she meets the requirements of subclause 685.212 (6) or (7) of Schedule 2.

14.[15.] It is clear that a spouse visa of the sort applied for by the applicant is not within such a class listed in this regulation. Section 48(1) therefore did not allow the applicant to apply for the visa she did apply for. It therefore followed by reason of section 46 that the application was "invalid" because within section 46(1)(d) it was "prevented by section 48".

15.[16.] The effect of the visa application being invalid was that the mandatory provisions of section 47(3) applied, so that "the Minister is not to consider an application that is not a valid application."

16.[17.] I consider that this language is absolutely clear. Whatever the background circumstances to the making of the application, and whatever circumstances might suggest the desirability of receiving and processing the application in question, the Minister did not have power in the present case to consider the application. I therefore consider that there was no legal flaw or defect in the decision taken and notified to the applicant in Ms Baker's letter of 15 February 2002, and there is no ground for judicial review in the present proceedings.

17.[18.] I must therefore dismiss the application.

18.[19.] I should, however, note the argument presented by Mr Ong. Mr Ong as I understand his submissions did not really contest that the effect of section 48 was as I have described above. His submission made the following points.

- 19.[20.] First, that it was unfair or inappropriate to refuse a spouse visa in circumstances where the parties had developed a long standing relationship since 1999, including by having a daughter and being allowed to continue in Australia since then.
- 20.[21.] Secondly, that the circumstances of the refusal of the business visa rendered it inappropriate to rely on the refusal of that visa for invalidating the present application, because he and his wife had wanted to appeal the decision to MIRO. They had endeavoured to do so by lodging an appeal, only to discover that they had inadvertently miscalculated the mandatory time limit on making an appeal by one day. They then lost the chance to have the merits of that decision reviewed.
- 21.[22.] Thirdly, that when they lodged the 2002 application for spouse visa they had read the Minister's media release as containing an assurance that people in their circumstances could come forward and apply for rectification of their migration status by making an application on-shore, and that he still thinks that this is the appropriate reading of the media release notwithstanding the second last paragraph.
- 22.[23.] As I have indicated above, I do not consider that any of these arguments can prevail against the clear legislative force of s.47 in relation to an invalid visa application such as the present.
- 23.[24.] Mr Ong indicated to me that they had not taken further advice on what alternatives there might be for regularising the applicant's status in Australia while the present proceedings were on foot. He was not clear on what avenues may or may not be available for doing that once these proceedings fail. Mr Cramer on behalf of the Minister was not able to clarify the situation either. Plainly, the applicant and her husband should now seek urgent advice on this.
- 24.[25.] I am unable to make any comment or recommendation bearing on any future decision in relation to the applicant's migration status. I do, however, think it may be appropriate to allow a short stay of the effect of my decision to allow them to take advice, taking note in particular of the length of time that the proceedings have been on foot in this court and the attachment of the applicant and her family to Australia.

RECORDED : NOT TRANSCRIBED

25.[26.] After hearing submissions from Mr Cramer and Mr Ong on behalf of the applicant I have decided that a short stay should be ordered. Mr Ong thinks that a bridging visa may be currently held by the applicant. Mr Cramer informs me that if that is the case, it is likely to continue for 28 days after the date on which my order takes effect. However, in the absence of clear evidence of a bridging visa and noting that Mr Cramer has honestly told me that he has no clear instructions about a bridging visa, I think it appropriate to ensure that the applicant have a short time to take proper advice on her circumstances. I will therefore allow 21 days before the order takes effect.

26.[27.] In relation to costs, Mr Cramer seeks an order that I award costs to the respondent fixed at \$3000 which is at the lower range of the conventional figure ordered in these matters. In my view it is appropriate to make that order as to costs. I am prepared, however, under rule 21.02(2)(d) of the Federal Magistrates Court Rules to give three months to pay those costs.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Smith FM

Associate: L. Khaw

Date: 31 August 2004